examination-in-chief that on May 14, 1974, his lawyers sent a notice to the appellant (P4) but sending is not the same as serving and though the appellant did in cross-examination admit he was given the notice, P2, he did not say when this was.

The learned magistrate should accordingly have dismissed the respondent's claim for possession on the ground that a condition precedent for the institution of ejection proceedings against the appellant had not been fulfilled, namely, the determination of his tenancy according to law. The appeal is accordingly allowed with costs both here and in the court below, the possession order is set aside and there will be an order for refund of the deposit for security for costs to the appellant.

Before departing, I should perhaps add that in view of the ground on which the appeal has been allowed, the respondents are, of course, at liberty, should they so wish, to institute fresh proceedings for ejectment after properly determining the appellant's tenancy according to law, in which case, I would venture to suggest that the guidance as to the steps to be taken by the parties which I have indicated earlier on in this judgment may perhaps be worth considering.

Appeal allowed.

Solicitors: *Kumar & Co.; Ariffin & Co.*

CHENG HAY GUN & ORS. v. PERUMAHAN FARLIM (PG.) SDN. BHD. & ANOR.

[O.C.J. (Mustapha Hussain J.) July 21, August 27, September 29 & 30; December 16, 1982]

[Penang – Civil Suit No. 311 of 1982]

Landlord and Tenant – Tenancy of land used as vegetable plots – Tenancy terminated by notice to quit – Whether developers can be stopped by injunction from entering vegetable plots to begin their development works – Whether vegetable plots premises within meaning of Control of Rent Act – Control of Rent Act, 1966, s. 2.

In this case the landlords of two big pieces of land in Penang engaged the defendants to develop the land. The acreage of the land was over 400 acres and on the lands were about 500 houses. The owners of these houses were ground tenants of the landlords paying ground rentals. Some of the five hundred tenants (including the plaintiffs) also rented out portions of the land adjacent to or near their houses to cultivate vegetable and fruit trees and paid separate rentals. The landlords had agreed to a scheme of compensation for the tenants which had been accepted by some of the tenants and rejected by others including the plaintiffs. The plaintiffs applied for an injunction to stop the defendants from trespassing, encroaching, or interfering with the tenancy of both the premises, that is the houses where the plaintiffs were staying and of the vegetable lots. In regard to the houses defendant's counsel undertook not to disturb the quiet occupation of the houses by the plaintiffs and the court only dealt with the question of the vegetable lots.

Held: (1) the vegetable lands in this case are not within the definition of "premises" to attract the protection of the Control of Rent Act 1966 and the landlords can terminate the tenancy;

(2) the plaintiffs have not succeeded in establishing claims for an injunction in respect of the vegetable lands such as to succeed for a permanent injunction at the trial; nor have the plaintiffs established a legal right to their claim recognisable by the court to grant an injunction;

(3) what the plaintiffs have is only an equity to the said vegetable land and this can be adequately compensated by damages.

Cases referred to:

(1) *Lewis* v. *Purvis* 177 L.T. 267.
(2) *Lister* v. *Pickford* [1861-1873] All E.R. Rep. 374.
(3) *Trim* v. *Sturminster Rural District Council* [1938] 2 K.B. 508.
(4) *Application des Gaz S.A.* v. *Falks Veritas Ltd.* [1974] Ch. 381.
(5) *London and Blackwall Ry.* v. *Cross* (1886) 31 Ch. D. 354, 369.
(6) *Khew Ah Bah* v. *Hong Ah Mye* [1971] 2 M.L.J. 86.
(7) *Gouriet* v. *Union of Post Office Workers* [1977] 3 W.L.R. 300; [1978] A.C. 435.
(8) *Corporation of Birmingham* v. *Allen* (1877) 6 Ch. D. 284.
(9) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.

CIVIL SUIT.

Tan Khek Pheng for the plaintiffs.

M. Shankar (*J.A. Yeoh* with him) for the defendants.

Cur. Adv. Vult.

Note: Four other Civil Suits, viz., C.S. 312/82, C.S. 313/82, C.S. 317/82 and C.S. 341/82, were also heard on the same date separately. In these four cases the plaintiffs are tenants and the law applicable is the same as in the instant case. Though the defendants' counsel applied to be joined together, the plaintiffs' counsel indicated that since the facts are not the same, they would like to make the application and submissions separately. Hence, these five applications were heard separately, though C.S. 313/82 and C.S. 317/82 were heard jointly. All these cases were heard and disposed of on the same day.

Mustapha Hussain J.: It is necessary to have a brief preface with the essential facts of the case before delving deeply into the Applications.

The facts of the case:

The Trustees of the Leong San Tong Khoo Kongsi, Penang, are the registered owners of two big pieces of land known as part of Holding No. 2532 and adjacent Lot No. 2497 both of Mukim 13, N.E.D., Penang (hereinafter referred to as "the lands"). The acreage is more than 400 acres and on the lands there are about five hundred houses. The owners of these houses are ground tenants of the landlords Khoo Kongsi (shortened name) and were paying ground rentals for the houses at $4 per month (as is in the instant case).

Some of the 500 or so tenants (like the plaintiffs in our case here) also rented out portions of the lands adjacent to or near their houses to cultivate vegetable and fruit trees and paid separate rentals at 90¢ per month at the rate of 10¢ per 1,000 sq. feet.

[Both parties agreed that the tenancy of premises is not in issue before this court, they being subjects before another tribunal for adjudication. The sole issue before the court is the tenancy of the vegetable plots and tenancies other than that of the premises.]

The landlords, the Khoo Kongsi, then decided to develop their lands into a small township, the developers being the defendants in this suit. The landlords have also agreed to a scheme of compensation for the tenants which has been accepted by some and rejected by others such as the plaintiffs in this suit.

On January 14, 1982, the second defendant, Sriwata Sdn. Bhd., as plaintiffs in Civil Suit No. 22 of 1982, obtained an interim injunction ex-parte against (1) Teh Mah Eg, (2) I'ng Kim Cheng, (3) Lim Cheng Teik, and (4) Lee Lian Chooi (sued on their own behalf as well as on behalf of and representing all the members for the time being of the Persatuan Penduduk Penduduk Kawasan Thean Teik dan Kampong Pisang, Ayer Itam, Pulau Pinang) from trespassing and interfering with the development work being carried out by the second defendants. The defendants/developers then proceeded to carry out development works like levelling the grounds by bulldozers etc. on those parts of the lands that were vacant. At the same time negotiations for compensation were being carried out. During the development operations the plaintiffs' vegetable plots were at some places affected and in fear of further damage the plaintiffs filed this suit on June 6, 1982 asking for an injunction to stop the defendants/developers from trespassing, encroaching, interfering with the quiet tenancy of both the premises (i.e. the houses where the plaintiffs are staying and of the vegetable plots).

The above are the prefaced facts in brief of the suit which has of late come into prominence in the press, and has become a grave social-political issue in the State.

When the plaintiffs' application for injunction against the defendants came up for hearing in Chambers on July 21, 1982, it was adjourned to open court for further arguments and in the meantime the court gave an interim order pending hearing and disposal in open court that the defendants do not proceed with the development works in respect of the plaintiffs' houses and vegetable plots except survey works.

The applications then came up for hearing in open court on August 27, 1982 and was again adjourned to September 29, 1982 and September 30, 1982 when it was finally disposed of. The court ordered that the plaintiffs' application for injunction against the defendants/developers be dismissed with costs. The practical effect of this order is that the defendants/developers can enter and develop the vegetable plots but NOT to disturb or touch the houses which the plaintiffs are occupying.

Coming now to the merits or otherwise of the application by the plaintiffs in this court: In the plaintiffs' affidavit (Encl. 3) there are exhibited six receipts for the premises entitled *"Receipt For Ground Rents ON HOUSES"* and also six receipts for the vegetable plots entitled *"Receipt For Ground Rent on VEGETABLE LANDS"*. The plaintiffs also exhibited the terms and conditions that appeared at the back of the receipts of both tenancies which read as follows:

"FOR THE HOUSES:

Terms and Conditions:

1. Rent collected is for site of house.
2. No ex-gratia payment will be made when site is required by our Kongsi.
3. Notice is hereby given that all owners of houses, buildings, sheds etc. erected in Sin Kang Estate are not

permitted to repair or make alterations, extensions, enclosures, transfer ownership, change attap roof, corrugated iron roof, asbestos roof, pigstys, poultry pens, including the building of new houses etc., unless prior permission in writing has been obtained from the Trustees of the Khoo Kongsi.

Should any ground tenant be found to have infringed any of the above conditions, the Kongsi shall have the right to demolish any building etc. at the expense of the owners, and no compensation or claims will be entertained by the Kongsi."

"FOR THE VEGETABLE LANDS:

Conditions of Lease on Vegetable Lands:

1. This Lease is optional to both parties, i.e. the Land-owners and Vegetable Gardeners (serving as Ground Tenant) carrying one month's notice from either side for its termination.
2. Upon termination of Lease, the Vegetable Gardeners hold the privilege to extend the Lease up to the time when the last cultivated crops are harvested.
3. No party is bound to pay any claim/compensation in kind for the termination of Lease.
4. The Vegetable Gardeners will maintain the land in vacant condition at all times and will refrain making construction of any erections altogether on the land.
5. If no cultivation of vegetables is made within one month's period and weeds are allowed to grow in place, the land-owners hold the right to cancel the Lease forthwith without any written warning to the Vegetable Gardeners."

Looking at these two types of receipts, it is clear beyond peradventure that there were two types of tenancies, with two separate receipts, and two separate terms and conditions of tenancy, namely,

(i) for the houses of which the plaintiffs were paying $4 per month; and

(ii) for the vegetable lands of which the plaintiffs were paying 90¢ per month (at the rate of 10¢ per 1,000 sq. feet of vegetable land leased – see affidavits Encl. 15 and Encl. 17).

The defendants sent notices to quit in respect of the premises on June 30, 1982 and in respect of the vegetable lands on July 20, 1982 (Encl. 11).

And now, the Law:

In this application to the court by the plaintiffs, the question is: can the defendants be stopped by injunction from entering into the vegetable plots to begin their development works?

[As stated earlier, the court is not concerned with the houses and the defendants' counsel undertook not to disturb the quiet occupation of the houses by the plaintiffs.]

The first question for consideration is that of law involved. Does the vegetable land come within and subject to the meaning of the definition of "premises" in the Control of Rent Act, 1966. In section 2 of the Control of Rent Act, 1966, "premises means any dwelling house ..... and any land ..... occupied therewith ..... " The vegetable lands in this case cannot by any stretch of the imagination be said to be the compound of the house or a garden to be enjoyed with the house. The fact that there was a separate tenancy and a separate rental clearly shows that they are not to be a unity of tenancy right from the beginning (*Lewis* v. *Purvis*[1] followed. See also meaning of "therewith" on p. 2761 of *Stroud's* Judicial Dictionary, 4th Edition). Neither can the vegetable lands be an "appurtenant" thereto to the plaintiffs' premises (See *Lister* v. *Pickford*[2], *Trim* v. *Sturminster*[3]).

This court is of the view that the vegetable lands in this case are not within the definition of "premises" to attract the protection of the Control of Rent Act, 1966, and the landlords can terminate this tenancy.

And now coming to the injunction sought by the plaintiffs:

The plaintiffs filed the suit and the application for injunction on June 6, 1982. The notice to quit of the vegetable land was given on July 20, 1982. The question whether an injunction ought to be granted has to be determined by reference to the circumstances and the state of law at the date when the question falls to be determined and not at the date of the issue of the writ (See *Application des Gaz S.A.* v. *Falks Veritas Ltd.*[4]). The tenancy of the vegetable land at the date of hearing (September 30, 1982) has already been determined by the notice to quit dated July 20, 1982. By August 31, 1982, what the plaintiffs have is only an equity on the said vegetable land and this can be adequately compensated (See *London and Blackwall Ry.* v. *Cross*[5]; *Khew Ah Bah* v. *Hong Ah Mye*[6]). This court after perusing the affidavits filed and after hearing arguments, is of the view that the plaintiffs have not succeeded

in establishing claims (for an injunction on the vegetable lands) such as to succeed for a permanent injunction at the trial. Nor have the plaintiffs established a legal right to their claim recognizable by the court to enable the court to grant an injunction (See *Gouriet* v. *Union of Post Office Workers*[7]; *Corporation of Birmingham* v. *Allen*[8]). This court is also of the view that damages would be an adequate remedy (*American Cyanamid Co.* v. *Ethicon Ltd.*[9]), and hence the plaintiffs' application for injunction is dismissed with costs.

Order accordingly.

Solicitors: *Tan, Yu & Co.; Shearn, Delamore & Co.*

GAN KIM KIAT & BROS. REALTY SDN. BHD. v. LEANG AH KAN

[A.C.J. (Peh Swee Chin J.) January 20 and February 10, 1983]

[Seremban – Civil Appeal No. 6 of 1982]

Practice & Procedure – Absence of solicitor in civil case is excused and postponement granted – Court must also excuse absence of his client. – Subordinate Courts Rules 1980, 0.28 rr. 5 & 7.

On May 7, 1982, Tampin Magistrate's Court Civil Action No. 43 of 1981 came up for hearing before the learned magistrate. The defendants' solicitor and his clients were present while the plaintiff's solicitor and his client were absent. The learned magistrate ordered that the action by the plaintiff be struck off. Prior to this, the solicitor for the plaintiff had applied for a postponement by letter on medical grounds, asking the court to excuse his absence later, but not the absence of his client. Having been so advised, the learned magistrate felt, no doubt, he was entitled to strike out the case.

The solicitor for the plaintiff duly applied to the learned magistrate for the reinstatement of the above case. In his affidavit filed in support, he stated that the plaintiff's absence in court on May 7, 1982 was due to his mistake in advising the plaintiff that the latter need not be present in court on May 7, 1982. The learned magistrate then made the order reinstating the case for hearing on July 19, 1982. The defendants appealed against the order of reinstatement.

Held, dismissing the appeal: (1) in a civil case, unlike a criminal case, a litigant can always be represented by his solicitor who is a duly authorised agent for a plaintiff or a defendant. Such being the case, when a civil case comes up for hearing as fixed, the solicitor can be present without his client;

(2) it follows that, when the absence of a solicitor in any case is excused and a postponement is granted, a court must also excuse the absence of his client;

(3) the learned magistrate was in error when in approving the application by the plaintiff's solicitor for postponement of the case he struck out the case at the same time for he should have adjourned the case to another date, and disregarded the absence of the plaintiff/respondent;

(4) under the Subordinate Courts Rules 1980, the procedure and practice of applying to set aside a judgment in default of appearance in the Subordinate Courts have been brought in line with those in the High Court so that the requirement of "good reason for absence be shown" mentioned in the repealed Subordinate Courts Rules, 1980, is no longer insisted on as a prerequisite, together with the usual affidavit of merits in an application to set aside judgment or order made in default of appearance.

(5) the appeal would therefor be dismissed and the plaintiff/respondent was ordered to pay all the costs thrown away on May 7, 1982 and all costs of application for "reinstatement" dated June 28, 1982. Tampin Magistrate's Court Civil Action No. 43 of 1981 would be fixed for hearing early.

CIVIL APPEAL.

F.H. D'Cruz for the defendants/appellants.

Sri Selvarajah for the plaintiff/respondent.

Cur. Adv. Vult.

Peh Swee Chin J.: In my view, this appeal is the result of a great deal of confusion on the part of all parties arising out of a few points of practice and procedure.

The following facts cannot be disputed or appear to be not in dispute. On 7.5.82, Tampin Magistrate's Court Civil Action No. 43 of 1981 came up for hearing before the learned magistrate. The defendants' solicitor and his clients were present while the plaintiff's solicitor and his client were absent. The learned Magistrate ordered that the action by the plaintiff be *struck off.* (the emphasis is mine).

It transpired, that prior to the above episode, the solicitor for the plaintiff had applied for a postponement by letter on medical grounds, asking the court to excuse his absence later, *but not* the absence of his client. (The emphasis is mine again). Having been so advised, the learned Magistrate felt, no doubt, he was entitled to strike out the case.

The solicitor for the plaintiff duly applied to the learned Magistrate for the reinstatement of the above case. In his affidavit filed in support, he stated that the plaintiff's absence in court on 7.5.82 was due to his mistake in advising the plain-